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No. 83-499

# In the Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD J. MARCUS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends (Pet. 30-50) that the district court should have dismissed the indictment under its supervisory power because some grand jurors did not attend one or more grand jury sessions and were not furnished transcripts of the missed proceedings. He also claims (Pet. 19-30) that he suffered actual prejudice from the occasional absence of grand jurors.

Upon his conditional plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 38 counts charging extortion, racketeering, unlawful receipt of payments by a labor official, and income tax evasion, in violation of 18 U.S.C. 1951 and 1962(c), 29 U.S.C. 186(a)(2), (b)(1), and (d), and 26 U.S.C. 7201. Petitioner was sentenced to four years' imprisonment and a $25,000 fine on the racketeering count, to be

followed by concurrent terms of five years' probation on the remaining counts. The court of appeals affirmed by judgment order (Pet. App. 1a-2a).

1. Petitioner, a business agent of Teamsters Local 169, was also the secretary-treasurer of the union. The indictment charged (C.A. Supp. App. 1a-49a), the government proffered evidence at the guilty plea hearing to prove, and petitioner acknowledged in pleading guilty, that petitioner extorted regular cash payments from at least 17 companies that employed members of Local 169. Petitioner also did not declare as income the payments he received in exchange for "labor peace" (C.A. Supp. App. 63a-69a, 87a-88a).

2. Prior to trial petitioner filed a Motion to Dismiss the Indictment or in the Alternative for Discovery of Matters Pertaining to the Grand Jury. The district court directed the government to disclose attendance records of the grand jury. The records, and two charts prepared by the government and stipulated to by petitioner (Pet. 9-10; Pet. App. 5a-7a), indicated that the 38-count indictment was returned by 19 grand jurors. Of the 19 jurors, 7 attended all 14 sessions of the grand jury. However, at least 17 jurors were present at each session, and at least 15 jurors heard testimony relevant to each count.[1] Finally, although the prosecutor did not furnish the absent jurors with transcripts of the sessions they missed (C.A. Supp. App. 43a), at the final session the FBI case agent and an IRS agent summarized the nature of the testimony previously heard on each count (*ibid.*).

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[1]The two charts presented to the district court, when read together, demonstrate the following: All 19 jurors heard evidence relevant to counts 4, 5, 14, 15, 18, 19, 30, and 31, presented on March 9, March 16, and June 29. Eighteen of the 19 jurors heard all the evidence with respect to 12 other counts (counts 10, 11, 20, 21, 24, 25, 33, 34, 35, 36, 37, and 38). Seventeen jurors heard all of the evidence introduced on 9 counts (counts 2, 3, 12, 13, 16, 17, 26, 27, and 32). Sixteen jurors heard evidence addressed specifically to the RICO count (count 1), and 15 jurors heard all of the evidence on counts 6, 7, 8, 9, 22, 23, 28, and 29.

3. Petitioner contends (Pet. 20-30) that the government's failure to furnish absent jurors with transcripts of the proceedings they missed prevented the grand jury from being informed on the counts upon which it indicted petitioner. However, as to each count, at least 15 of the 19 jurors voting to return the indictment had also been present when the evidence relevant to that count was offered. Fed. R. Crim. P. 6(f) requires that "[a]n indictment may be found only upon the concurrence of 12 or more jurors." Thus, each count was found by a sufficient number of informed jurors to satisfy the Rule, and petitioner was accordingly indicted on all counts by a properly informed grand jury.

Petitioner's claim of "actual injury" (Pet. 25) is consequently reduced to the allegation that, of the 19 jurors who voted to indict, a few may have voted for counts on which they heard only a brief summary. Because those votes did not result in an indictment that would otherwise not have been returned, this claim of "actual injury" is without substance.[2]

The courts of appeals have uniformly refused to dismiss indictments even when fewer than 12 grand jurors were present at all of the grand jury sessions. See *United States* v. *Provenzano*, 688 F.2d 194, 201-202 (3d Cir. 1982), cert. denied, No. 82-763 (Dec. 6, 1982); *United States* v. *Godoy*, 678 F.2d 84, 86 (9th Cir. 1982), cert. denied, No. 82-538 (Nov. 7, 1983); *United States* v. *Lang*, 644 F.2d 1232, 1235-1239 (7th Cir.), cert. denied, 454 U.S. 870 (1981); *United States* v. *Leverage Funding Systems, Inc.*, 637 F.2d 645, 647-648 (9th Cir. 1980), cert. denied, 452 U.S. 961

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[2]Petitioner complains (Pet. 25) that, because they were uninformed, the jurors "could not participate intelligently in deliberations." However, since under Fed. R. Crim. P. 6(f) no more than 12 jurors need vote to return the indictment, those extra jurors' inability to participate intelligently would have no effect on the validity of the indictment.

(1981); *United States* v. *Colasurdo*, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); *Lustiger* v. *United States*, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 607 (2d Cir.), cert. denied, 323 U.S. 790 (1944); *United States* v. *Pastor*, 419 F. Supp. 1318 (S.D.N.Y. 1975); *United States* v. *Armour & Co.*, 214 F. Supp. 123, 124 (S.D.Cal. 1963); cf. *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1115 (E.D. La. 1970). In light of those decisions, there is no reason to require a broader remedy here, when a sufficient number of jurors heard the evidence relevant to each count returned by the grand jury.[3]

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[3]Relying on the Third Circuit's exposition in *United States* v. *Provenzano*, 688 F.2d at 203 n.1, petitioner contends that the court should have dismissed the indictment because the prosecutor did not provide absent jurors with transcripts of missed testimony. The court of appeals, adopting the Seventh Circuit's reasoning, recognized the remedial effect of "giving replacement and absent grand jurors the opportunity to review transcripts * * * of missed sessions." 688 F.2d at 203 (quoting *United States* v. *Lang*, 644 F.2d at 1239). Accordingly, the court suggested that "furnishing transcripts to absent jurors is a practical way to avoid attacks on grand jury voting in the future." *Ibid.* By its very language, the *Provenzano* court suggested that the remedy was to be prospectively applied to future grand juries. That decision came down in September 1982, almost three months after the instant indictment was returned.

Even assuming, arguendo, that the court of appeals in *Provenzano* informed the government that it risked dismissal under the court's supervisory power if it failed to furnish transcripts to absent jurors, exercise of that authority would be singularly inappropriate in this situation. First, as noted above, at least 12 jurors heard all the evidence as to each count, so the jury was not uninformed without the transcripts. Moreover, courts have also recognized the value of summaries to fill in gaps in missed testimony. *United States* v. *Lang*, 644 F.2d at 1239. Here, the abbreviated summations at the final grand jury session by the FBI case agent and the IRS agent capsulized both petitioner's

Finally, petitioner concedes (Pet. 7) that the government presented sufficient evidence to support the indictment. He contends nonetheless that the indictment should be dismissed under the court's supervisory power (Pet. 30-50). However, as this Court recently recognized, "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have been obtained notwithstanding the asserted error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless error doctrine that a judgment may stand only when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.' " *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6 (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)).

The government's failure to make transcripts of missed testimony available to absent jurors in this case did not result in an improperly returned indictment: each count was voted on by at least 12 fully informed grand jurors. Accordingly, the complained-of defect is, if error at all, harmless under any standard, and the requested remedy is wholly unnecessary and inappropriate.

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general scheme and the particular activities charged in the separate counts that followed his pattern of activity.

Finally, the Third Circuit's suggestion that transcripts be made available is not grounded in the Constitution, nor does it involve "an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *United States* v. *Johnson*, 457 U.S. 537, 544 (1982) (quoting *Williams* v. *United States*, 401 U.S. 646, 653 (1971)). Rather, the court of appeals merely proposed a new rule of grand jury procedure, in a "clear break with the past" (*United States* v. *Johnson*, 457 U.S. at 549 (quoting *Desist* v. *United States*, 394 U.S. 244, 248 (1969)). Such new rules are not to be applied retroactively.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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